U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LORETTA YOUNG-LOVE and DEPARTMENT OF DEFENSE, TRANSPORTATION OFFICE, Fort Benning, GA

Docket No. 00-2675; Submitted on the Record;
Issued June 27, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's March 8, 2000 request for reconsideration as untimely and failing to demonstrate clear evidence of error.

On September 14, 1998 appellant, then a 53-year-old transportation assistant, filed a notice of traumatic injury and claim for compensation/continuation of pay, alleging that, on September 2, 1998, she tore some ligaments in her neck when she was in an automobile accident in the course of her federal employment.

By letter dated September 25, 1998, the Office requested further information from appellant.

On October 19, 1998 appellant sent the Office the military police report regarding the accident.

In a decision dated October 30, 1998, the Office denied appellant's claim as it found that appellant failed to establish that she sustained an injury as alleged. Specifically, the Office determined that, although the initial evidence of file supported that appellant actually experienced the claimed accident, the evidence did not establish that a condition had been diagnosed in connection with this accident.

On December 13, 1999 appellant submitted unsigned medical notes from Stephenson Chiropractic Center dated from September 4 to October 28, 1998. At this time, appellant also submitted an October 29, 1998 report by Dr. George F. Stephenson, a chiropractor, who indicated that appellant suffered from "acceleration/deceleration injury to the cervical spine, cervical sprain/strain and cephalgia." In the medical history portion of the report, he noted that appellant "stated that a military HMMV backed up over the hood of her car."

By letter dated March 8, 2000, appellant requested reconsideration. In her request, appellant alleged that she forwarded medical information to the Office, which was received on October 19, 1998, but that this paperwork was not made a part of appellant's file until sometime after October 30, 1998 and was not in her file when the Office denied the claim.

By decision dated June 5, 2000, the Office denied appellant's request for reconsideration for the reason that it was not timely filed and that appellant had not shown clear evidence of error.

The Board finds that the Office properly determined that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may --
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> (1) end, decrease or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued."[1]

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that the Office will not review a decision unless the application for review is filed within one year of the date of that decision. As appellant filed his request for reconsideration on March 8, 2000, over one year after the October 30, 1998 decision of the Office, appellant's petition for reconsideration was not timely filed.

However, the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review shows clear evidence of error on the part of the Office in its most recent merit decision.[2] To establish clear evidence of error, claimant must submit evidence relevant to the issue that was decided by the Office. The evidence must be positive, precise and explicit and must be manifested on its face that the Office committed an error.[3] Evidence that does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[4] It is not merely enough to show that the evidence could be construed so as to produce a contrary conclusion.[5] This entails a limited review by the Office of the evidence previously of record and

[1] 5 U.S.C. § 8128(a).

[2] 20 C.F.R. § 10.607(b).

[3] 20 C.F.R. § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

[4] *Jimmy L. Day*, 48 ECAB 654 (1997).

[5] *Id.*

whether the new evidence demonstrates clear evidence of error on the part of the Office.[6] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying a merit review in the fact of such evidence.[7]

In the instant case, appellant alleged that there were medical reports submitted on October 19, 1998, which were not considered by the Office in its October 30, 1998 decision. After a careful review of the record, the Board notes that the document submitted on October 19, 1998 was not medical evidence, but rather was a military report regarding the accident, which report was not relevant to whether appellant sustained a medical condition as a result of the accident. The first time any medical evidence was submitted was on December 13, 1999. This evidence would not be sufficient to show clear evidence of error, as none of the medical evidence provides a rationalized medical opinion as to how appellant's medical condition was related to the accident of September 2, 1998. The Board further notes that the report of Dr. Stephenson, appellant's chiropractor, does not constitute probative medical evidence as section 8101(2) of the Act provides that the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."[8] In this case, Dr. Stephenson did not diagnose subluxation by x-ray.

As appellant's untimely request for reconsideration failed to establish clear evidence of error in the Office's denial of benefits, the Board finds that the Office properly denied the request.[9]

[6] *Id.*

[7] *Thankamma Mathews*, 44 ECAB 775, 770 (1993).

[8] *Sheila A. Johnson*, 46 ECAB 323 (1994).

[9] The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(a).

The decision of the Office of Workers' Compensation programs dated June 5, 2000 is affirmed.

Dated, Washington, DC
June 27, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member